# THE FEDERAL ANTI-TRUST ACT AND MINORITY HOLDINGS OF THE SHARES OF RAILROADS BY COMPETING COMPANIES.

THE case of the Northern Securities Company[1] did not stop with deciding that the persons in control of the Great Northern and Northern Pacific Railway companies, in jointly promoting the organization of the Securities Company and causing to be transferred to it a majority of the shares of each of the rival railways, formed a combination in restraint of trade in violation of § 1 of the Anti-trust Act, but also decided, as the Government had contended in the bill and in all the arguments, that the vesting of a majority of the shares of the two roads in the Securities Company created a monopoly within the meaning of § 2 of the act. It is true that having come to the conclusion that § 1 had been violated, the judges devoted little space in their discussions to § 2. Enough was said, nevertheless, to show that they held that that section of the law, as well as the first, had been broken. Thus, in the opinion announcing the affirmance of the decree of the circuit court, the question was asked:

"Is the case as presented by the pleadings and the evidence one of a combination or a conspiracy in restraint of trade or commerce among the states, or with foreign states? *Is it one in which the defendants are properly chargeable with monopolizing or attempting to monopolize any part of such trade or commerce?* Let us see what are the facts disclosed by the record."[2]

Having seen what the facts disclosed by the record were, this was the answer:

"In our judgment, the evidence fully sustains the material allegations of the bill, and shows a violation of the Act of Congress, in so far as it declares illegal every combination or conspiracy in restraint of commerce among the several states and with foreign nations, *and forbids attempts to monopolize such commerce or any part of it.*"[3]

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[1] 193 U. S. 197.

[2] P. 320. The italics are the writer's.

[3] P. 325. The italics are the writer's.

And in his concurring opinion Mr. Justice Brewer said:

"It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical, monopoly, *and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly.*"[1]

At first it was thought by some that this case turned upon the narrow consideration that (as assumed) the alleged sale of the stocks of the two roads to the Securities Company was — to borrow from a distinguished lawyer's comment upon the decree when rendered by the circuit court — "merely colorable, and that in truth it was a device to the effect of enabling the transferors to retain their beneficial interest in the several railway companies while each of them renounced his individual voice and vote as a shareholder";[2] that if the transaction had been a real out and out sale — that is to say, if the Securities Company had been a real purchaser — the decision must have been different, since it was not to be supposed that in the passage of the Anti-trust Act Congress intended to put a limitation upon the right of a person, natural or artificial, to purchase property. But this theory was soon to be discredited in the case of Harriman *v.* Northern Securities Company,[3] where the Supreme Court held that the decision in the Northern Securities Company's case would have been the same whether the Securities Company had acquired the shares of the Great Northern and Northern Pacific Railway companies merely as custodian or trustee for its promoters, or as an absolute purchaser in its own right; although in point of fact it did acquire them, the court went on to say, as a purchaser in its own right. So if there were ever any ground for doubting that the Northern Securities Company's case decided that the purchase of a majority of the shares of two competing interstate railroads by a third corporation creates a combination violative of § 1 of the act, and a monopoly violative of § 2, it was swept away by the decision in Harriman *v.* Northern Securities Company. It hardly needs to be added that if it is a violation of the law for a third corporation to buy a majority of the shares of two competing railroads, *a fortiori*, it must be so for one of such railroads itself to buy a majority of the shares of the other; for the lodging of a majority interest in the

[1] P. 363. The italics are the writer's.

[2] Sir Frederick Pollock, 17 HARV. L. REV. 154.

[3] 197 U. S. 244.

stock of one of two competing roads immediately in the other would produce a more direct and, if anything, a more effective restraint upon competition between them than if a third corporation held majority interests in the stocks of both.

From this point it is an easy step to the conclusion that the purchase by one of two competing railroads of sufficient shares in the other to control and shape its affairs in the normal course of business, although less than a majority, is also a violation of the act.

No rule of law makes the control of a corporation depend upon the ownership of a majority of all its shares. On the contrary, the rule, of course, is that a majority in interest of the shareholders present at the corporate meetings from time to time govern the corporation. And it is notorious that many shareholders habitually neglect to attend corporate meetings, or take any part whatever in the affairs of the corporations of which they are members, and many others habitually hand over their votes to the dominant shareholder or group of shareholders. In this way the number of shares needed to control a corporation is reduced much below a majority of the entire issue: how much below is a question of fact to be determined in each particular case. Only in the ideal instance where all the shareholders might be expected to attend the corporate meetings would it hold true that a majority of all the shares of a corporation is required to control it. On all sides in the business world are instances where the control of a corporation is just as firmly held through the ownership of a large minority of its shares as through the ownership of a majority, and the knowledge that this is so is acted upon every day. In a recent inquiry by the Interstate Commerce Commission a member of a banking house, with probably as much experience in such matters as any other in the world, testified that even 29.59 *per centum* of the shares of a railroad corporation were generally sufficient to give control.[1] It is therefore perfectly evident that if control is shown to exist in fact, it is a mere non-essential, whether it exists by virtue of the ownership of a majority of the shares of the corporation or of a smaller number; and unless this is recognized and acted upon by the courts, as it has been by bankers and promoters of corporate combinations, the way to evade the decision, that the act of Congress reaches the form of monopoly resulting from the concentration of controlling stock interests in competing railroads in the same hands, is clear, simple, and certain.

[1] *In re* Consolidations, etc., 12 Interst. C. Rep. 277, 293.

The notion that a combination or monopoly in violation of the act is not established unless it be shown that an actual majority of the shares of each of the competing railroads has been lodged in the same hands is founded, it seems probable, upon the erroneous theory that the determination of what number of shares held by one corporation in another is enough to vest the one with power to control the other is a question of law, and therefore one to be solved by a general rule applicable to all cases, whereas in truth it is a question of fact, and therefore one to be determined separately in each case as it arises. This view is supported by the decision of the Supreme Court in the Pearsall case.[1] There it was held that the laws of Minnesota forbidding any railroad corporation to consolidate with, lease, or purchase, or in any manner become owner of, or control any other railroad corporation, or any stock, franchise, rights, or property thereof, which owns a parallel or competing line, would be violated by the transfer of half the shares of the then recently reorganized Northern Pacific Railway Company to the shareholders of the Great Northern Railway Company in consideration of the latter company's guaranteeing the bonds of the former. The court said:

"As the Northern Pacific road also controls, by its own construction and by the purchase of stock, other roads extending from the Mississippi River to the Pacific Ocean, and operates as a single system an aggregate mileage of 4,500 miles, most of which is parallel to the Great Northern System, the effect of this arrangement would be to practically consolidate the two systems, to operate 9,000 miles of railway under a single management, and to destroy any possible advantages the public might have through a competition between the two lines.[2] . . .

"The consolidation of these two great corporations will unavoidably result in giving to the defendant a monopoly of all traffic in the northern half of the state of Minnesota, as well as of all transcontinental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of the Minnesota legislature of 1874 and 1881 undoubtedly reflected the general sentiment of the public, that their best security is in competition."[3]

And yet a half of the shares of a corporation are not a majority, so how could the court have held that the transfer of half the shares of the Northern Pacific Company to the Great Northern Company "would be to practically consolidate the two systems," and that such a consolidation would "unavoidably result in . . . a

[1] 161 U. S. 646. [2] P. 670. [3] P. 677.

monopoly," except upon the theory that what number of shares held by one railroad in a competitor will give the one sufficient control over the other to destroy competition between them and create a monopoly is not a question of law to be determined by a general rule applicable to all cases, but is a question of fact; and that if such control be proved to exist in fact in any given case, it is immaterial whether it results from the ownership of a majority of the shares of the subservient road or of a smaller number? For, if it were a rule of law that not less than a majority of shares would be deemed a controlling interest in such cases, a half would in principle come as far from satisfying the rule as a third or a fourth.

But if this much were accepted, the more difficult question would remain, Whether the purchase by a railroad of less than a controlling minority interest — in short, of any shares — in a competing line is also a violation of the act of Congress? If the act went no farther than to denounce contracts which completely destroy competition and monopolies which have been accomplished, it would need be conceded that in respect to its application to intercorporate stock ownership among railroads its limits had been reached in the proposition that it is violated if one of two competing railroads acquires sufficient shares of the other to control its affairs, though less than a majority. But the act goes very far beyond that. It reaches attempts to monopolize, though these never ripen into monopolies in fact.[1] It reaches every contract or combination "in whatever form, of whatever nature, and whoever may be the parties to it, which directly or necessarily operates in restraint of trade or commerce among the several States,"[2] and these embrace not only contracts which totally suppress competition, but as well those which "prevent the free operation of competition," or, in the more common phrase, "necessarily tend to suppress competition."[3] And of especial importance here, the Supreme Court has declared that contracts are illegal under the act, however partial the restraint which they impose upon competition, if the business affected is of a public character like transportation.[4] In the case of the Trans-Missouri Freight Association, in reply to a contention that the association did not suppress competition but

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[1] § 2.

[2] Loewe *v.* Lawlor, 208 U. S. 274, 297.

[3] Northern Securities Co. *v.* U. S., 193 U. S. 197, 328, 331, 352.

[4] U. S. *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290; see also 21 HARV. L. REV. 62.

only reasonably restricted it, Mr. Justice Peckham, who delivered the judgment, quoted a passage from the opinion in Gibbs *v.* Consolidated Gas Co.,[1] containing the well-known statement, "In the instance of business of such character that it presumably cannot be restrained to any extent whatever without prejudice to the public interest, courts decline to enforce or sustain contracts imposing such restraint, however partial, because in contravention of public policy," and then went on to say:

"The above extract from the opinion of the court [in the Gibbs case] is made for the purpose of showing the difference which exists between a private and a public corporation — that kind of a public corporation which while doing business for remuneration is yet so connected in interest with the public as to give a public character to its business — and it is seen that while, in the absence of a statute prohibiting them, contracts of private individuals or corporations touching upon restraints in trade must be unreasonable in their nature to be held void, different considerations obtain in the case of public corporations like those of railroads where it well may be that *any* restraint upon a business of that character as affecting its rates of transportation must thereby be prejudicial to the public interests."[2]

No strained construction is required to bring within the broad purview of the act of Congress as thus defined the purchase of shares — that is, any shares — in one of two competing railroads by the other. The purchase of the shares of one railroad corporation by another is, of course, a contract, a contract of sale,[3] the effect of which is to make the one road a part owner, beneficially, of the property of the other, and to give it a voice in the other's management. If the two roads are competitors, the necessary tendency of the contract is to put an end to competition between them, because the proprietors of the one having become by virtue of the contract the proprietors of the other, in part at least, the motive for competition is either destroyed or greatly weakened. The force with which this tendency will make itself felt may range all the way from a mere restraint or restriction upon competition to the point where competition is crushed completely and a monopoly substituted, according as the shares which the one road has acquired in the other are few or many. But, as shown, whether

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[1] 130 U. S. 396, 408.

[2] P. 334. The italics are the writer's.

[3] Lurton, J., in Marble Co. *v.* Harvey, 92 Tenn. 115; Speer, J., in Langdon *v.* Branch, 37 Fed. 449.

the result be the restriction of competition or its complete destruction, the contract, under the rulings of the Supreme Court,[1] is one in restraint of trade under § 1 of the Anti-trust Act, because its necessary tendency is to suppress competition, and because also, the business affected being of a public character, the law will not suffer it to be restrained to any extent whatever. If it be said that there might be instances where the shares so acquired by one competing road in another would be so few that the effect upon competition could not be measured, the answer is ready: "courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public."[2] And how could any other answer be thought of? For if it were attempted to draw the line just where the one road's holdings in the other would begin to affect competition between them, an issue impracticable of solution would arise under the weight of which the enforcement of the law at this point would necessarily break down.

In a recent opinion the Interstate Commerce Commission recognized the fact that the holding of any shares of one of two rival railroads by the other is bound to restrict competition between them, for it took occasion there to say that "so long as it is the policy of the general government and of the states to maintain competition between naturally competing lines, the ownership of *any* stock by one railway in a competing railway should not be permitted."[3]

So far it has been as a contract in restraint of trade that we have viewed the purchase of shares by a railroad in a competing line. Consequently nothing has yet been said of the intent back of the purchase, because it seems settled by judgments of the Supreme Court that a specific intent to restrain or monopolize trade is not an essential ingredient of any of the offenses created by the Anti-trust Act (excepting, of course, attempts to monopolize), and is therefore not material where, as must be the case with the purchase of shares of one of two competing railroads by the other, the certain and natural effect of the contract is to suppress or tend to suppress competition in commerce,[4] and becomes mate-

[1] Loewe *v.* Lawlor; Northern Securities Co. *v.* U. S.; and U. S. *v.* Trans-Missouri Freight Ass'n, *supra.*

[2] Salt Co. *v.* Guthrie, 35 Oh. St. 666, 672.

[3] *In re* Consolidations and Combinations of Carriers, etc., 12 Interst. C. Rep. 277, 305.

[4] U. S. *v.* Trans-Missouri Freight Ass'n, *supra;* U. S. *v.* Addyston Pipe Co., 175 U. S. 211.

rial only where the contract or other act is by itself equivocal or uncertain in its bearing upon commerce; and it is then material, not as an element of the offense, but as evidence to show that the act does or does not produce the forbidden result, either alone or as part of a plan. Shawnee Compress Co. *v.* Anderson[1] is an instance where evidence of a specific intent to suppress competition brought an act otherwise equivocal and of uncertain significance within the law's inhibition, while in Anderson *v.* United States[2] an innocent intent had the reverse effect.

When, however, it is shown that the shares in the competing line are bought with the specific intent to break down or weaken its rivalry, the transaction, in addition to being a contract in restraint of trade, becomes an attempt to monopolize, a distinct offense. And if in any case such intent cannot be shown by direct evidence, it will be presumed, for when a corporation chartered to operate a railroad, and therefore supposed to devote its capital to that purpose, buys and holds in its treasury shares of another line, not an extension or feeder of its own, but in active competition with it, it will not be heard to deny the only logical inference to be drawn from its action.

The conclusion thus reached, that it is a violation of the Anti-Trust Act, because destructive of competition and promotive of monopoly, for one of two competing railroads to acquire any shares of the other, is strongly fortified by the authorities declaring the same thing to be contrary to the common law,[3] since not only is that "the system from which our legal definitions are derived,"[4] but in respect to this particular subject matter Congress has made the common law, with widened scope, the very law of the United States.

In the first of the cases referred to,[5] in which the right of the appellant company to purchase either the stock or the property and franchises of a competing line was drawn in question under a section of the Constitution of Kentucky prohibiting any railroad to

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[1] 209 U. S. 423.

[2] 171 U. S. 604.

[3] Louisville & Nashville R. R. Co. *v.* Kentucky, 161 U. S. 677; Central R. R. Co. *v.* Collins, 40 Ga. 582; People *v.* Chicago Gas Trust Co., 130 Ill. 268; Milbank *v.* N. Y., L. E. & W. R. R. Co., 64 How. Pr. 20; Pearson *v.* Concord R. R. Co., 62 N. H. 537; Memphis & Charleston R. R. Co. *v.* Woods, 88 Ala. 630; Noyes, Intercorporate Relations, § 292; Cook, Stock and Stockholders, § 315.

[4] Bradley, J., in Moore *v.* U. S., 91 U. S. 270, 274.

[5] Louisville & Nashville R. R. Co. *v.* Kentucky, *supra.*

consolidate its stock with, or acquire by purchase, lease, or otherwise, any railroad owning a parallel or competing line, the Supreme Court declared:

"Not only is the purchase of stock in another company beyond the power of a railroad corporation in the absence of an express stipulation in the charter, *but the purchase of such stock in a rival and competing line is held to be contrary to public policy and void.* Cook, Stock & Stockholders, § 315; Central R. R. Co. *v.* Collins, 40 Ga. 582; Hazelhurst *v.* Savannah, G. & N. A. R. R. Co., 43 Ga. 13; Elkins *v.* Camden & A. R. R. Co., 36 N. J. Eq. 5. The doctrine is peculiarly applicable to this case, in which it is shown that the Chesapeake Company was largely aided in its construction by contributions from municipalities along its line for the very purpose of obtaining competition with the Louisville & Nashville Company, — a purpose which would, of course, be defeated by a combination with it. This restriction upon the unlimited power to consolidate with other roads is not, as the plaintiff in error suggests, called for by any new view of commercial policy, but in virtue of a settled policy which has obtained in Kentucky since 1858, in Minnesota since 1874, in Ohio since 1851, in New Hampshire since 1867, and by more recent enactments in some dozen other States, — a policy which has not only found a place in the statute law of such States as apprehended evil effects from such consolidations, *but has been declared by the courts to be necessary to protect the public from the establishment of monopolies.* Indeed, the unanimity with which the states have legislated against the consolidation of competing lines shows that it is not the result of a local prejudice, but of a general sentiment that such monopolies are reprehensible." [1]

It is to be noticed that the court says here that while the purchase of shares in one railroad by another not a competitor, in the absence of express authority, is held to be beyond the power of that particular railroad but nothing worse, the purchase of shares in one railroad by another which is a competitor is held to be not only beyond the power of the particular railroad but contrary to public policy and void, that is, contrary to general law, common or statute. We are to observe, too, that this consequence follows whatever the number of shares so purchased, for the words of the court are that the "purchase of stock" in a competing line is held to be contrary to public policy, and by a familiar rule the word "stock" as used here without any qualification as to amount must be assumed to mean any stock. Moreover, the context itself

[1] P. 698. The italics are the writer's.

excludes any other meaning. It is the same "purchase of stock in another company" (in kind and quantity) which the court speaks of as being beyond the power of a railroad corporation unless expressly authorized, and as being, in addition, contrary to public policy where the other line is a rival and competing line. That is to say, whatsoever purchase of stock in another company is beyond the power of a railroad corporation is also contrary to public policy where the other company is a competitor. And it is settled law that the purchase of any stock — not some particular amount — by one railroad in another is beyond its power unless authorized. But to go back, why is the transaction contrary to public policy when the roads are competitive and not when they are non-competitive? Obviously for no other possible reason than this, that, as stated in the cases cited by the court, where the roads are competitive the purchase by one of shares in the other tends to suppress competition between them and to create a monopoly; which is the reason pointedly recognized by the court itself when it goes on to say of the doctrine which it had just announced, that it "is peculiarly applicable to this case, in which it is shown that the Chesapeake Company was largely aided in its construction by contributions from municipalities along its line for the very purpose of obtaining *competition* with the Louisville & Nashville Company, — a purpose which would, of course, be defeated by a combination with it."[1] From the declaration under discussion, therefore, the principle is deducible that the purchase of any shares in one railroad by another which is a competitor is contrary to public policy, because, by destroying in whole or in part, depending upon the number of shares so acquired, and for a period of indefinite duration, the free agency of the road whose stock is purchased, it restrains if it does not extinguish competition between the two. And, of course, where the roads are engaged in interstate commerce the public policy violated is that of the United States as expressed in the Anti-trust Act.

Important also is the clause toward the end of the quotation, in which the court speaks of the restriction in the Kentucky Constitution upon the consolidation of railroads, which it was construing, namely, that "no railroad shall consolidate its *capital stock*, franchises, or property, . . . *in whole or in part*, with any other railroad . . . owning a parallel or competing line," as "a policy which has not only found a place in the *statute* law of such states as appre-

[1] The italics are the writer's.

hended evil effects from such consolidations, *but has been declared by the courts* to be necessary to protect the public from the establishment of monopolies."[1] This remark can only mean that the purchase by one of two competing railroads of shares in the other or of the property of the other is not only a violation of the statutes and constitutional provisions which specifically prohibit any railroad to purchase stock in, or acquire by purchase, lease, or otherwise, a competing line, but is also declared by the courts to be a violation of the general inhibitions of the common law against contracts, combinations, or other arrangements which directly promote monopolies, and necessarily therefore a violation of statutes embodying such inhibitions of the common law; as, for example, the federal Anti-trust Act.

If it be said that the declaration which has been under discussion is not decision but only a dictum, it is at any rate the dictum of the Supreme Court. And as Mr. Justice Harlan observed in the Northern Securities Company's case, propositions of law laid down in former decisions of the Supreme Court "cannot be ignored or their effect avoided by the intimation that the court indulged in *obiter dicta*" if "what was said in those cases was within the limits of the issues made by the parties,"[2] as undoubtedly it was in the case under consideration.

In Central Railroad Co. *v.* Collins,[3] cited by the Supreme Court in the case just left, the Central Railroad and Banking Company and the Southwestern Railroad Company, corporations of Georgia, had effected a joint purchase from the city of Savannah of 12,383 of the 36,912 shares of a competing line, the Atlantic & Gulf Railroad Company, also a corporation of Georgia. They held no other shares in that company beside these. Certain minority shareholders of the several roads concerned who objected to the transaction brought a bill in equity to cause a rescission of the purchase on the grounds that it was beyond the powers granted in the charters of the companies making the purchase, and that it was contrary to the public policy of the state — contrary to public policy because it restricted competition between rival railroads. The Supreme Court of Georgia decided that on both of the grounds put forward by the complainants it was unlawful for the Central and Southwestern Railroad companies, or either of them, to hold the shares which they had acquired in the Atlantic & Gulf Railroad Company.

[1] The italics are the writer's.

[2] 193 U. S. 197, 332.

[3] 40 Ga. 582.

On the point that such shareholding was unlawful because its necessary tendency was to destroy competition between rival railroads, the court said:

"Thus far we have considered this question solely in reference to the right of a stockholder to insist upon it that the company shall not violate his rights by compelling him, against his will, to become a partner in an enterprise not contemplated in the contract. But the stockholder has a right to insist upon it, that the funds of the company, in which he has an undivided interest, shall not be used in violation of the public policy of the State. . . .

". . . It is the rivalry of opposing interests, the struggle for success, nay, even for life, with dangerous opposition, that gives life, enterprise and success to railroads as to other human undertakings. It has been the conflict with thirty State lines, each with its opposing interests, and with numerous seaboard cities, each seeking to attract the rich outpourings from the great interior, that has begotten the mighty network of iron which interlaces our extensive territory, and I am convinced that there is no public policy more striking than that which, whilst it fosters every such undertaking, is yet careful ever to keep in view the danger of a monopoly, and the good effect of rivalry and conflict between different companies."[1]

In a concurring opinion the Chief Justice added:

". . . It follows that there is no public policy of the State recognizing the right or power of the Central Road to lease or otherwise control the Atlantic and Gulf Road.

"But on the contrary, the public policy of this State, as clearly shown by its legislation, is to encourage fair and just competition, between the different railroad companies of the State, and to discourage monopolies."[2]

While from some general expressions of the judges it can be seen that it was in their minds that if the Central Railroad should hold these 12,383 of the total 36,912 shares of the Atlantic & Gulf Railroad it would in all probability, with the aid of other stockholders or by the purchase of additional shares, eventually gain absolute control over the subservient road, it is yet nowhere stated or implied in the opinions that the decision that the transaction violated public policy because promotive of monopoly depended upon the number of such shares so held by the Central road being a controlling interest. Nor could it have been made to depend upon that condition, for the simple reason that the question of fact

[1] P. 628.

[2] P. 640.

whether 12,383 did or did not constitute a controlling interest in the shares of the Atlantic & Gulf road was not determined. Necessarily, therefore, the decision must have proceeded, as the logic of the reasoning employed quite plainly imports, upon the broader principle that it is against public policy to permit a railroad to hold shares in a competing line regardless whether the number so held be a controlling fraction or less; and that the courts and text-writers have so construed it is shown by the circumstance that it is invariably cited in support where that principle is announced.[1]

In People *v.* Chicago Gas Trust Co.[2] it appeared that the Chicago Gas Trust Company had been created under the general incorporation law of Illinois providing for the organization of corporations "for any lawful purpose," its articles of incorporation declaring one of its purposes to be "to purchase and hold or sell the capital stock . . . of any gas-works or gas company or companies . . . in Chicago . . . or elsewhere in . . . Illinois." The contention of the State, which the court sustained, was that this was not a "lawful purpose," as the carrying out of it might lead to the creation of a monopoly of the manufacture and sale of gas in the city of Chicago. And in fact the defendant company had acquired a majority of the stock of four other gas companies in Chicago, thus effecting an absolute monopoly of the gas supply of that city; and this circumstance, illustrating strikingly as it did the danger of conceding to such corporations the power to purchase shares of stock in one another, naturally assumed a prominent place in the discussions of the court. The actual judgment, however, which was rendered on a demurrer to defendant's pleas, did not depend upon this circumstance, but covered the broader ground, that to purchase shares of the capital stock — that is, any shares, whether a majority or not — of competing gas companies was not a "lawful purpose" for which to organize a corporation, as the execution of such a purpose would necessarily tend to suppress competition and create a monopoly in a business of a public character. This is evident from many expressions in the opinion of the court; for example, this:

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[1] See Louisville & Nashville R. R. Co. *v.* Kentucky, *supra;* People *v.* Chicago Gas Trust Co., *supra;* Noyes, Intercorporate Relations, *supra;* Cook, Stock and Stockholders, *supra;* note, 18 L. R. A. 253; article in 32 Amer. Law Reg. 1055; article in 27 Amer. Law Rev. 341.

[2] 130 Ill. 268.

"It may be here stated, as showing the policy of the State to be against the purchase by one gas company of stock [not any particular amount] in other corporations, that the power to purchase such stock is not granted in any of the more than fifty special charters above named."[1]

The court, indeed, expressly stated at the beginning of its opinion that this broader question was before it.[2]

The denial of power in the defendant company to purchase and hold shares of the capital stock of other gas companies was thus the gravamen of the decision. The fact that in this particular case the defendant company had exercised the power to the extent of acquiring a majority of the shares of other companies was a persuasive but not the controlling factor. This decision, therefore, squarely supports the proposition that the acquisition by one of two or more corporations, engaged competitively in a business impressed with a public interest, of shares in either of the others is forbidden by public policy, as declared in the common law (there was no statute on the subject in Illinois when this case was decided), because it would tend to suppress competition and create monopoly. And it is cited as a leading authority to this effect by Judge Noyes in his treatise on Intercorporate Relations,[3] and by other text-writers.

From this review of leading cases it appears that at common law, in this country at any rate, it is not merely *ultra vires* but also contrary to public policy, because destructive of competition and promotive of monopoly, for a railroad to acquire shares of the capital stock of a competing company. And if such a thing violates the common law it violates also the law of the United States, when the railroads are interstate lines, regardless whether the common

[1] P. 298.

[2] "The first, third and seventh pleas aver that the defendant uses and exercises 'the power, liberty, privilege and *franchise* of purchasing and holding the capital stock of gas companies in the State of Illinois,' and that, in such use and exercise thereof, 'it has purchased and still holds *capital stock* of the four gas companies,' etc., without stating how much capital stock it holds. The demurrer to these pleas might well have been sustained on the ground that they do not answer the information. The information charges that the defendant has purchased and holds a majority of the shares of stock in each of the four companies, while the pleas answer by saying that defendant holds 'capital stock,' and do not set forth whether the stock so held is a majority or less than a majority of the shares. If it be conceded, however, that the three pleas are not defective for the reason thus specified, they present the question whether appellee can lawfully purchase and hold shares of stock in other gas companies, the number of such shares being less than a majority, and, therefore, too small to give a controlling interest in such other companies." P. 281.

[3] § 292.

law in general is or is not a part of the law of the United States as a body politic distinct from the several States; for in the Anti-trust Act Congress has with respect to interstate commerce enacted into the statute law of the United States all the inhibitions of the common law against agreements, combinations, and monopolies in restraint of trade, and more besides. So recently as in Loewe *v.* Lawlor,[1] the Supreme Court, answering the contention in that case, that "even conceding that the declaration states a case good at common law . . . it does not state one within the statute," declared that "United States *v.* Trans-Missouri Freight Ass'n, 166 U. S. 290; United States *v.* Joint Traffic Ass'n, 171 U. S. 505; and Northern Securities Co. *v.* United States, 193 U. S. 197, hold in effect that the anti-trust law has a broader application than the prohibition of restraints of trade unlawful at common law."

Thus, whether we look to the terms of the act of Congress itself, or whether, knowing the prohibitions of the common law against restraints of trade to be if anything less wide than those of the act, we turn to the precedents of the common law, the conclusion arrived at is the same.

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[1] 208 U. S. 274, 296, 297.